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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 61 **61**

JOHN HUGHES and LOUIS RICHARDSON,
Petitioners,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

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In the Supreme Court

OF THE

United States

October Term, 1949

No. 61

John Hughes and Louis Richardson,
Petitioners,

vs.

Superior Court of the State of California in and for the County of Contra Costa,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The petitioners herein were found guilty of contempt by the California Superior Court for wilfully disregarding a preliminary injunction granted by that

Court. The injunction was granted on the basis of a complaint filed by Lucky Stores, Inc. (hereinafter referred to as Lucky) and affidavits in opposition to the injunction filed by the petitioners. The facts, essentially undisputed, must be gleaned from these documents and from a stipulation made in connection with a petition for a writ of certiorari in the California District Court of Appeal.

On or about May 17, 1947, petitioner John Hughes, an officer of the Richmond Branch, Progressive Citizens of America, and petitioner Louis Richardson, president of the Richmond Chapter, National Association for the Advancement of Colored People, along with others, met with officials of Lucky to protest the actions of certain employees of Lucky in arresting one McKennley Jackson, allegedly guilty of petty theft. (R. 26-27.) At this meeting petitioners requested that Lucky discharge an employee who had fired a pistol in connection with the arrest of McKennley Jackson. (R. 26-27.) They also requested that Lucky hire gradually at its Canal Store Negro clerks in future vacancies until the proportion of Negro clerks to white clerks approximated the proportion of Negro and white customers. (R. 27.) Lucky refused to discuss the subject of having the Negro and white clerks at the Canal store approximate the proportion of Negro and white customers and the discussion ended. (R. 27.)

On or about May 19, 1947, members of the Progressive Citizens of America, Richmond Branch, and of the N. A. A. C. P., Richmond chapter, and others,

picketed Lucky's Canal Store. (R. 28, 31.) This picketing, concededly peaceful, and employing not more than six pickets at one time, continued until May 21, 1947. (R. 28.) The pickets carried placards containing the statements that Lucky refused to hire at its Canal store a proportion of Negro and white clerks approximating the proportion of Negro and white customers at such store; and that Lucky refused to discharge or transfer the employee who fired a pistol in the McKennley Jackson incident. (R. 28.)

On May 20, 1947, Lucky filed in the Superior Court of Contra Costa County a verified complaint seeking an injunction against picketing by petitioners in repetition of their demands. (R. 1-8.) Among other things, this complaint contained the following undenied allegations: that Lucky was bound by a valid collective bargaining contract with the Retail Clerks Union, Local No. 1179, under which Lucky's employment needs were to be filled from union listings to the extent that such listings provided qualified personnel (R. 2-4, 8-18); that Lucky would suffer irreparable damage unless the picketing were restrained in that Lucky would be prevented from carrying on its normal operations and continued picketing would lead to a closing of Lucky's stores (R. 5); and that there existed between organized labor and labor unions in the County of Contra Costa a common agreement and understanding that neither the unions, nor the members thereof, would pass through a picket line, whether the objects of that picket line were legal or illegal, proper or improper. (R. 6.)

A hearing was held on May 26, 1947, based on the verified complaint and the affidavits of petitioners (R. 34), and the following injunction was issued on June 5, 1947:

> "It is hereby ordered that a preliminary injunction be, and the same is hereby granted restraining defendants from picketing or taking position in front of any of the places of business of Lucky Stores, Incorporated, for the purpose of compelling plaintiff to do any of the following acts:
>
> "(1) the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores;
>
> "(2) the discharge of those employees participating in the apprehension and arrest of McKinnley Jackson, a colored person accused of the theft of six pounds of bacon from one of plaintiff's store units located near the Canal Housing Project, Richmond, California." (R. 35.)

Subsequently, on June 21, 1947 petitioners picketed the Canal Street store, carrying placards reading: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize". (R. 38, 43.) Petitioners were adjudged in contempt of the order granting the preliminary injunction and sentenced by the Superior Court of Contra Costa County to two days in the county jail or to pay a fine of twenty dollars. (R. 36.) Petitioners then sought to have this judgment of contempt annulled in certiorari proceedings in the California Appellate Courts. In those proceedings it was agreed by counsel for both parties that the

issue concerning the discharge of employees participating in the arrest of McKennley Jackson had dropped from the case, and the injunction was treated as being directed solely against picketing for the selective hiring of Negro clerks. (R. 91.) It is the decision of the Supreme Court of California affirming the judgment of contempt which is now before this Court for review. (R. 90-97.)

One further observation should be made concerning the record. No facts were before the trial Court to show whether or not Lucky discriminated against Negroes in hiring employees. In their affidavits in opposition to the granting of the injunction the petitioners did not state either that Lucky discriminated or that the picketing was for the purpose of preventing discrimination. Instead they explicitly stated that the purpose of the picketing was to compel Lucky to hire a proportion of Negro and white clerks approximating the proportion of Negro and white customers at such store. (R. 28, 31.) In the picketing for which petitioners were found in contempt they bore signs reading only: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." (R. 38, 43.)

Reduced to its essentials for constitutional purposes the case, then, is as follows: Petitioners demanded that Lucky, which was not alleged to practice race discrimination, achieve and maintain a relation of Negro to white employees comparable to its proportion of Negro to white customers. Lucky refused this demand, whereupon petitioners engaged in peaceful

picketing which was sufficiently effective to compel Lucky either to accede to petitioners' demands or to close the picketed store. Upon complaint of Lucky the trial Court issued a narrowly drawn injunction restraining picketing for the purpose of compelling Lucky to adopt a proportional hiring system. Petitioners violated this injunction and were adjudged guilty of contempt.

QUESTION PRESENTED

Whether the First and Fourteenth Amendments deny the State the power to restrain picketing which presents a clear and present danger that the important State policy against race discrimination will be rendered ineffective.

ARGUMENT

I. INTRODUCTION

Ever since *Thornhill v. Alabama*, 310 U.S. 88 (1939), this Court has been troubled with the problem of the extent to which labor picketing is protected against state regulation by the First and Fourteenth Amendments. (See Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 532; Dodd, *Picketing and Free Speech, A Dissent*, 56 Harv. L. Rev. 513; Armstrong, *Where Are We Going With Picketing?*, 36 Cal. L. Rev. 1; Gregory, *Labor and the Law* (1946) 334-377). As most recently expressed by this Court the rule of the First Amendment is that speech is "* * * pro-

tected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (*Terminiello v. Chicago*, 337 U.S. 1, ___, 93 L. ed. 865, 868 (1949)). As we read the picketing cases (though they have not talked much in terms of the clear and present danger test) they have been concerned chiefly with determining whether the substantive evil involved was sufficiently serious to justify the restraint on speech. It was settled in the *Thornhill* case and in *A. F. of L. v. Swing*, 312 U.S. 321 (1940), that the mere risk of economic injury to the employer picketed is not a sufficiently serious evil to justify restraint of picketing. (See also, *Bakery & Pastry Drivers & Helpers v. Wohl*, 315 U.S. 769 (1941); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).) On the other hand, when the picketing was set in a context of violence an injunction was upheld. (*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940).) When the picketing was extended to a business wholly out of the economic context of the labor dispute involved, the danger of injury to the interests of the public at large was held to be sufficiently serious to justify enjoining the picketing. (*Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1941).) And most recently when the picketing clearly endangered enforcement of the State's anti-trust policy, an injunction was upheld. (*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).)

The picketing in the *Meadowmoor*, *Ritter's Cafe* and *Giboney* cases was enjoinable, not as suggested by

petitioners in their brief, pages 7-9, because it was coercive, but because the coercive aspects made clear and present the danger that the particular substantive evil involved would ensue. The picketing in the instant case, though carried on by a racial group rather than a labor union, must, on the record, be held to have been sufficiently coercive to present a clear and present danger that it would be effective to compel Lucky to adopt a discriminatory hiring system. The injunction in this case was not, as suggested by petitioners in their brief, page 21, directed merely against peaceful picketing by two individuals for a few hours. Actually picketing was carried on for three days by as many as six pickets in front of a single grocery store and did not cease until after the complaint for an injunction was filed. The undenied allegations of the complaint were that this picketing was so effective that if continued it would compel Lucky to close its store. Furthermore the undenied allegation of the complaint that organized labor in the area had an agreement and understanding not to pass through any picket line, legal or illegal, suggests that, contrary to the statement by petitioners in their brief, page 8, this was a case where organized labor extended its sympathy and support to the dispute with all the familiar consequences that such support entails. And the fact that the picketing was carried on by Negroes in a strong Negro neighborhood involved a form of coercion quite beyond that involved in the mere dissemination of the information that Lucky refused to hire Negroes in proportion to Negro patronage. Consider the position of the Negro who condemned the actions of the minority groups repre-

sented by petitioners and felt them detrimental to the best interests of his people. In a situation likely to be surcharged with emotion, and in which most members of the community would not think through the various implications of the action taken, could he disregard the picket line and trade with Lucky? Or by so doing would he lose whatever prestige and influence he might have with the Negro community at large?

Since the record leaves no doubt that petitioners' picketing presented a clear and present danger that they would accomplish their objective, the only substantial issue left before the Court is whether that objective presented a sufficiently serious substantive evil to justify restraining the picketing. The following sections of this brief will be devoted to our contention that such a serious substantive evil was present here.

II. THE PICKETING IN THE INSTANT CASE WAS FOR THE SOLE PURPOSE OF COMPELLING LUCKY TO ADOPT A DISCRIMINATORY HIRING POLICY BASED ON RACE.

The record in this case fully supports the conclusion of the California Supreme Court that the sole objective of the picketing was "* * * the discriminatory hiring of a fixed proportion of Negro employees regardless of all other considerations * * *" (R. 91.) At the trial the petitioners made no claim that Lucky discriminated against Negroes in its hiring policy. Petitioners' own affidavits reveal that they made no protest to Lucky against discrimination; instead they demanded that Lucky fill all forthcoming vacancies

with Negroes until the Negro and white clerks in the store approximated the proportion of Negro and white customers. (R. 27, 30.) The picketing which preceded the issuance of the injunction was not in protest against any alleged discrimination, but rather against Lucky's refusal to hire Negro clerks in proportion to Negro customers. The injunction issued was precisely drawn to ban only picketing for that narrow purpose, and the picketing for which petitioners have been held in contempt was in deliberate violation of that narrow prohibition. (See opinion of California Supreme Court, R. 95.)

We agree with much that petitioners say in their brief regarding the depressed condition of the Negro people. We, too, sympathize with all reasonable efforts by the Negro people to improve their lot and to remove the widespread discrimination against them which unhappily still exists. We agree with petitioners when they say in their brief, page 11, that the effect of discrimination against Negroes is "* * * the denial of the right to be judged, and to participate fully in the manifold activities of American life, on the basis of individual merit rather than on the basis of skin coloration." We are wholeheartedly in support of reasonable activities designed to give that right to the Negro people. But in this case the petitioners went beyond any such objective. Using the economic power which they possessed in a community of substantial Negro composition they sought to impose on Lucky a hiring policy which discriminated in favor of Negroes, a policy which, in fact, would set up a quota of jobs for

Negroes based on skin coloration rather than individual merit.

The record does not in any way support the assumption of petitioners in their brief, page 12, that the picketing here was in protest against a refusal by Lucky to give fair consideration to efforts to obtain jobs for Negro people. In fact, an affidavit presented to the California District Court of Appeal, but not considered by the California Supreme Court because not necessary to its decision, shows that in response to a request by another Negro organization, the Knights Political League, Lucky had adopted a policy of hiring Negroes in its store. (R. 45-47.) It was only petitioners' demand for a hiring policy based on race and discriminating in favor of Negroes which Lucky rejected.

Nor does the record support the assumption of petitioners in their brief, page 15, that Lucky did not hire Negro clerks. Since petitioners made no such contention at the trial, there was no reason for Lucky to demonstrate its freedom from discrimination. No issue of discrimination on the part of Lucky is before this Court. It is entirely consistent with the record to assume that Lucky hired its employees on the basis of individual merit, without respect to race, creed or color; that as such an employer, Lucky was faced with demands by representatives of two small organizations that it agree to fill all future vacancies up to fifty per cent of its labor force with Negroes, regardless of other considerations, or be subject to the burdens of a picket line. On the record presented, it

appears that it was petitioners' demand and not Lucky's refusal to discuss that demand which was unreasonable and arbitrary."

In short, as the California Supreme Court put it, compliance with petitioners' demands would "* * * to the extent of the fixed proportion, make the right to work for Lucky dependent not on the fitness for the work nor on an equal right to all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object". (R. 96.)

III. THE OBJECTIVE OF THE PICKETING WAS CONTRARY TO THE POLICY OF THE UNITED STATES CONSTITUTION AND THE LAW OF CALIFORNIA AND PRESENTED A SUBSTANTIVE EVIL OF SUFFICIENT MAGNITUDE TO JUSTIFY THE INJUNCTION.

A. The policy of the National Constitution.

This Court has long held that the Fourteenth and Fifteenth Amendments to the National Constitution forbid state action discriminating against persons on account of race, color, creed or nationality. (*Strauder v. West Virginia*, 100 U.S. 303 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Truax v. Raich*, 239 U.S. 33 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Takahashi v.*

Fish & Game Comm'n, 334 U.S. 410 (1948).) Furthermore, this Court has pointed out that the Constitutional command is freedom from intentional discrimination against any race and not proportional representation of the various races. In one of the earliest cases involving alleged discrimination against Negroes in jury selection, this Court said:

> "* * * It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws. * * *" (*Virginia v. Rives*, 100 U.S. 313, 322-323 (1880).)

And more recently, in a case involving alleged discrimination against Negroes in the selection of grand jurors, this Court said:

> "Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. *The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection.* Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted

> with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' Hill v. Texas * * *." (*Akins v. Texas*, 325 U.S. 398, 403 (1945); italics added.)

Is there any doubt that a state statute or municipal ordinance requiring employers in retail businesses to hire clerks of various races in the same proportion as the races served by the business would be held invalid? (*Cf. Buchanan v. Warley*, 245 U.S. 60 (1917).) And had Lucky agreed to the demands of petitioners in this case would not state Court enforcement of such an agreement (*e.g.*, in a suit by petitioners to compel the discharge of a non-Negro clerk hired before the agreed proportion of Negro clerks was reached) be invalid under the doctrine of *Shelley v. Kraemer*, 334 U.S. 1 (1948)?

Petitioners contend in their brief, page 17, that preferential treatment for Negroes is not discrimination because they are a uniquely oppressed and exploited social group. For this proposition they cite cases such as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912), where legislation granting special privileges to women was upheld. But petitioners overlook the fact that, while classifications based on sex may be reasonable for such purposes as minimum wage legislation, classifications based on race are seldom justifiable under our Constitution (*Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Oyama v. Cali-*

fornia, 332 U.S. 633 (1947)) and are clearly unreasonable for the purpose of determining the right to work. (*Cf. Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948)). A hiring system giving preference to Negroes necessarily discriminates against members of other races. And this Court has long held that the Fourteenth Amendment is "* * * for the benefit of all of every race whose cases are embraced by its provisions, and not alone for the benefit of the African race." (*Kentucky v. Powers*, 201 U.S. 1, 32-33 (1905); see also *Buchanan v. Warley*, 245 U.S. 60 (1917).)

B. The state law.

Obviously the Fourteenth Amendment does not apply directly to forbid the activities of the petitioners in this case, since no state action was involved. But as long ago as the *Civil Rights Cases*, 109 U.S. 3, 17 (1883), this Court suggested that an individual who interfered with the rights guaranteed by the Fourteenth Amendment rendered "* * * himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed." In applying to the case at bar the policy of the State of California according to all persons the right to work free from discrimination based on race or color, the California Supreme Court was only carrying out the state obligation suggested in the *Civil Rights Cases*.

Some years prior to the picketing by the petitioners in this case, the California Supreme Court held that

the common law of California contained a public policy against racial discrimination by private as well as public action. (*James v. Marinship Corp.*, 25 Cal. (2d) 721, 739, 155 P. (2d) 329, 339, (1944).) Part of the language used by the Court in the *Marinship* case, in which it held that a union which excluded Negroes could not enforce a closed shop policy, is well worth quoting here:

> "The discriminatory practices involved in this case are, moreover, contrary to the public policy of the United States and this state. The United States Constitution has long prohibited governmental action discriminating against persons because of race or color. (5th, 14th and 15th Amendments.) * * * Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color. Defendants contend that 'individual invasion of individual rights' can be prohibited only by a statute of the state, and they point out that California statutes forbidding racial discrimination by private persons relate only to certain specifically enumerated businesses such as inns, restaurants, and the like, but not to labor unions (Civ. Code, §§ 51-52). It has been said, however, that such statutes, to the extent that they embrace public service businesses, are merely declaratory of the common law. (Citing cases). It was well established at common law that inn-keepers and common carriers were under a duty to furnish accommodations to all persons, in absence of some reasonable ground (citing cases), and if colored persons are furnished separate ac-

commodations they must be equally safe, commodious and comfortable (citing cases). *The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved.* Where, as here, a labor union has attained a monopoly of the labor supply through closed shop agreements, such a union, like a public service business, may not unreasonably discriminate against Negro workers for the sole reason that they are colored persons." (Italics added.)

Pursuant to this general policy the California Court in several cases has held invalid closed shop contracts providing for discrimination against Negro workers and has permitted the excluded Negroes to enjoin both the union and the employer from performing the contract. (*James v. Marinship Corp., supra; Williams v. Int. etc. of Boilermakers*, 27 Cal. (2d) 586, 165 P. (2d) 903 (1946); *Thompson v. Moore Drydock Co.*, 27 Cal. (2d) 595, 165 P. (2d) 901 (1946).) In the instant case the California court held that attempts by Negroes to exert economic pressure to obtain a discrimination in their favor fell under the ban of the state law equally with attempts by whites to obtain discrimination in their favor.

The contention by petitioners in their brief, page 19, that the picketing here did not violate any law except a judge-made law formulated after the event is not supportable. The California Court had stated in the

Marinship case that the public policy of California was opposed to racial discrimination, and that such policy was enforceable without the necessity of any statute. Such a determination by the highest Court of the State clearly fixes the law of the State without the necessity of any legislative enactment. (*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 297 (1940).) It is a novel argument indeed, in view of our common law heritage, that only a legislative determination can establish law.

We disagree with the contention of petitioners in their brief, page 19, that the question raised is whether a state Court can, by resorting to its own conception of what constitutes an illegal purpose, define and circumscribe the area in which the constitutional guarantee of free speech shall operate. Rather, we must accept the state Court's determination that the picketing is for an objective contrary to the law and policy of the State, and the question then becomes whether the evil proscribed by the State is of sufficient magnitude to justify the restraint on speech. Inevitably the policies of the various States, whether expressed by their Courts or their legislatures, will vary, but the constitutional problem is the same: is the evil at which the State is hitting sufficiently serious to justify restraint of speech. The constitutional principle is vindicated if this Court upsets a conviction in one State resulting from an injunction against picketing protesting discrimination and affirms a conviction in another State resulting from an injunction against picketing to compel discrimination. The statement of

Mr. Justice Brandeis, dissenting in *Duplex Printing Co. v. Deering*, 254 U.S. 443, 488 (1921), to which the petitioners refer on page 20 of their brief, is not relevant to the problem before the Court in this case. In the first place, he was dealing with the power of a federal district judge to enjoin certain labor activity, not the power of the highest Court of a State to determine the public policy of that State. Furthermore, he stated earlier in the same paragraph from which petitioners quote: "Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, *I do not wish to be understood as attaching any constitutional or moral sanction to that right.* All rights are derived from the purposes of the society in which they exist: above all rights rises duty to the community." (Italics added.)

The California law does not support the contention made in the dissenting opinion of Justice Traynor in this case that the picketing was merely to compel Lucky to adopt a policy which it was free to adopt. As a result of the *Marinship* and following cases the freedom of action of the employer who seeks to discriminate on the basis of race is clearly limited. In those cases the employer as well as the union was enjoined from enforcing the contract which resulted in discrimination. In the instant case had Lucky capitulated and agreed to petitioners' demand, it seems clear that excluded clerks of other races could have sued to enjoin both Lucky and petitioners from enforcing the

agreement, and the Court assumed that picketing and economic pressure would be permissible against an employer who discriminates to force him not to do so. Whether, in the absence of an agreement on the part of Lucky to discriminate, affirmative relief would be available has not yet been decided by the California Court. However, there may have been a suggestion of some remedy when the Court said in *Bautista v. Jones*, 25 Cal. (2d) 746, 749, 155 P. (2d) 343, 345 (1944), that the right to work "* * * is safeguarded from legislative action which discriminates against a person or class of persons in respect of opportunities to obtain work or enter into business (citing cases); and *it is also protected in some degree against arbitrary action by private organizations, including employers and labor unions.* (*James v. Marinship Corp.*, supra.)". (Italics added.)

C. The seriousness of the substantive evil.

The danger which the State was seeking to avoid when it enjoined the picketing by petitioners in this case was the danger of nullification of the state policy that the right to work should depend on the fitness for work, on an equal right of all, regardless of race, to compete in an open market for jobs. We contend that this policy, coinciding as it does with constitutional command, is of vital importance in our society, composed of many races and creeds, and clearly sufficient to justify the injunction.

We cannot look at this case, as do petitioners, in the framework of a group of Negroes seeking to obtain a

few additional jobs for members of their race. Its implications go far beyond. If this Court should hold that petitioners have a constitutional right to picket to compel Lucky to hire employees on the basis of the racial composition of its clientele, the door is necessarily opened for members of all races to do the same. The accentuation of racial antagonisms which could result from widespread picketing by various racial groups seeking preferential treatment in areas where they are able to impose economic pressure is apparent. And everywhere that such picketing is successful, hiring will be made to depend on race, rather than the equal right of all.

Picketing of this type, if permitted to go on unchecked, could well destroy the substantial advances already made in California, both as a result of governmental and non-governmental activity, toward reducing racial discrimination. Employers who have been compelled to hire Negroes on a quota basis in Negro areas, Japanese in Japanese areas, Chinese in Chinese areas, etc., may with some justification reject protests against discrimination in other areas. Negroes and other minority groups must of necessity depend to a very considerable degree on employment outside the areas where they can exert economic pressure. Yet the attempt to obtain preferential treatment at home may result in increased discrimination elsewhere. If the petitioners had been successful in their picketing in this case, for example, imagine the effect on negotiations for employment of Negro clerks in retail stores outside the Negro area.

In substance this case involves a conflict between the petitioners and the State of California as to the best method by which a common goal may be achieved. Both are seeking the ideal situation which we all hope may be reached—complete freedom from discrimination based on race. In previous cases where the discrimination has been against Negroes the California Supreme Court has provided remedies to the Negroes against the employers and unions guilty of the discrimination. In the present case the Court has assumed that the Negroes are free to picket and exert economic pressure against employers who are discriminating to compel cessation of that discrimination. But when the petitioners, in their eagerness for an immediate improvement in the lot of Negroes, go beyond this right and demand discrimination in favor of Negroes and against other races, the Court holds that they are jeopardizing the common goal and may be enjoined.

This Court has in the past sustained interferences with picketing speech by Illinois to prevent civil commotion and intimidation, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940), by Texas to inhibit the embroilment of neutrals in labor disputes, *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1941), and by Missouri to strike down arrangements in restraint of trade, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Is the Court now to say that, unlike those state policies, the policy of California to combat racial discrimination

in employment is not so important that its achievement may involve restrictions on picketing? This the Court must say if it is to overturn the action of the California Courts in the present case. This, we respectfully submit, the Court, alert to sustain state policies in accord with its own views on race equality, should not and will not say.

IV. THE NEW NEGRO ALLIANCE CASE DOES NOT SUPPORT THE POSITION TAKEN BY THE PETITIONERS.

The Court in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), expressly directed itself solely to the question whether a federal Court had jurisdiction of the cause in view of the provisions of the Norris-LaGuardia Act prohibiting the issuance of injunctions by federal Courts in cases involving labor disputes. Concluding that picketing by members of one race to secure employment of their race constituted a "labor dispute," the Court naturally concluded that the federal Court injunction was issued without jurisdiction.

The Norris-LaGuardia Act does not apply to state Courts. Nor does California have such a statutory provision. The sole question here is whether the injunction issued by California deprived petitioners of a constitutionally protected right to speak. The most that implication from the *New Negro Alliance* case can contribute to the solution of this case is that picketing by racial groups is to receive no less favor-

able treatment than does union picketing. Respondent has never doubted this, and now asserts it to be the case. California has long recognized that the right to picket is not a right of organized labor alone, but of the public as a whole. (*In re Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938)).

In the *New Negro Alliance* case the Court was dealing with a significantly different factual situation. The petitioners in that case complained that the respondent discriminated against Negroes in hiring, and the picketing was in protest against such discrimination. While they sought to compel respondent to hire Negroes, they did not seek to compel him to adopt a hiring policy which discriminated in favor of Negroes by allocating a specific quota of jobs to them. Furthermore, the injunction in that case was broadly phrased, restraining the petitioners from picketing respondent's store for any reason. Had a similar factual situation been present in the instant case, we have no doubt that the California Courts would have refused, and properly so, to enjoin the picketing.

V. BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

On page 2 of its brief the Congress of Industrial Organizations states that this case "* * * presents squarely the question whether a state court can

merely by declaring that peaceful picketing is for an 'unlawful purpose' as defined by its own judicial decisions, confer upon itself power to enjoin such picketing despite the protection of the Fourteenth Amendment."

We do not argue for an affirmative answer to that question, and we contend that though the question be answered in the negative the judgment in this case should be affirmed. The fact that the state Court in deciding the case within the framework of state law talked in terms of unlawful objective instead of clear and present danger does not justify reversing its decision. This is especially true where the Court below is one which has demonstrated its understanding of the clear and present danger test, received it as a part of state law, and applied it in its decisions (*e.g.*, *Danskin v. San Diego Unif. Sch. Dist.*, 28 Cal. (2d) 536, 171 P. (2d) 885 (1946); *In re Blaney*, 30 Cal. (2d) 643, 184 P. (2d) 892 (1947)).

State Courts as well as state legislatures determine the law and policy of the states. In *Gibonney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949), this Court quoted the opinion of Mr. Justice Brandeis dissenting in *Duplex Printing Co. v. Deering*, 254 U.S. 443, 488 (1921), to show that a state legislature has the power to set the limits of permissible contest open to industrial combatants, not to show that the judges of the highest Court of a state may not establish the law and policy of the state. And the *Gibonney* case did

not decide that the state must make criminal the objective of the picketing before picketing may be enjoined. (See *Chester, etc. Union v. Wilbank*, 360 Pa. 48, 60 A. (2d) 21 (1948), *cert. den.* 336 U. S. 945 (1949)).

When, as here, a state Court has enunciated a state policy, and affirms an injunction against picketing seeking an objective contrary to that policy, the constitutional question left for this Court is whether the picketing presents a clear and present danger of a sufficiently serious substantive evil. We have presented in the earlier sections of this brief the reasons why we think this Court should conclude both that the picketing in this case constituted a clear and present danger and that the substantive evil was sufficiently grave to justify limiting the speech involved. We make no contention that the state court's determination that the picketing was for an unlawful objective precludes an independent determination by this Court of the issues of clear and present danger and serious substantive evil.

VI. CONCLUSION.

The decision of the California Supreme Court reannounces and applies the policy and law of the state. "The relation of the United States and the Courts of the United States to the states and the Courts of the states is a very delicate matter." (Mr.

Justice Frankfurter, dissenting in *Terminiello v. Chicago*, 337 U.S. 1, [illegible], 93 L. Ed. 865, 871 (1949)). The state court determination should not be disturbed unless it is clear that a right accruing under the Constitution or laws of the United States has been denied.

The right to speak is not absolute. As Mr. Justice Jackson said, dissenting in *Terminiello v. Chicago*, 337 U. S. 1, [illegible], 93 L. Ed. 865, 880 (1949), "* * * freedom of speech exists only under law and not independently of it." This principle was expressed at the inception of the clear and present danger test in *Schenck v. United States*, 249 U.S. 47 (1918), and remains an integral part of that test.

The present case is one in which a food retailer, which was not even alleged to practice race discrimination, was picketed with the sole object of compelling it to follow a proportional system of hiring based on race, discriminating against those other than the selected race. The picketing was sufficiently effective that the management had either to accede to the demands or to close the picketed business. The state, pursuant to the national and state policy against race discrimination, and to avoid the imminent impairment thereof, issued and affirmed a narrowly drawn injunction proscribing picketing for adoption of a quota hiring system. This Court, we respectfully submit, should not deny the state power so to act in implementation of the important policy

against race discrimination. The judgment of the Court below should be affirmed.

Dated, Oakland, California,
October 26, 1949.

Respectfully submitted,
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